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IN THE

Supreme Court of the United States

MICHAEL DONALD DODD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the one-year limitations period in 28 U.S.C. § 2255 para. 6(3) begins to run on the date on which this Court initially recognizes the asserted right, or whether it begins to run on the date on which all of the prerequisites in paragraph 6(3) are met?

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INTEREST OF AMICI CURIAE[1]

National Association of Criminal Defense Lawyers

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with direct national membership of over 11,500 attorneys, in addition to more than 28,000 affiliate members from all 50 states. Founded in 1958, NACDL is the only professional bar association that represents public defenders and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates. NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice.

National Association of Federal Defenders

The National Association of Federal Defenders (NAFD) is a nationwide, non-profit, volunteer organization whose membership includes attorneys and support staff of the Federal Defender Offices from across the country. The NAFD was formed in 1995 to enhance the representation provided under the Criminal Justice Act and the Sixth Amendment of the United States Constitution. One of the NAFD's missions is to file *amicus curiae* briefs to ensure that the position of indigent defendants in the criminal justice system is adequately represented.

Pursuant to the Criminal Justice Act, attorneys in the NAFD have been appointed by the federal courts to represent numerous indigent federal and state prisoners who have filed

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[1] Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members or counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been lodged with the Clerk of Court pursuant to Rule 37.3.

motions under 28 U.S.C. §§ 2254 and 2255 seeking to have their sentences vacated and convictions overturned. The NAFD thus has a strong interest in ensuring that these defendants are not barred by an unduly restrictive interpretation of when the one year time period for filing such petitions begins to run. As the institutional defenders for indigent defendants, the NAFD also has a unique interest in all issues of federal criminal procedure, and a unique perspective to offer the Court concerning the statutory issues involved in interpreting 28 U.S.C. § 2254 and § 2255. In addition, the NAFD is particularly well positioned to anticipate on a practical level how differing interpretations of these statutes will affect indigent habeas petitioners.

STATEMENT

Under the Antiterrorism and Effective Death Penalty Act (AEDPA), habeas petitioners may file a petition for relief once this Court has recognized a new rule and that new rule has been "made retroactively applicable." AEDPA provides, however, that petitioners must do so within one year. The question presented here is whether that one-year period begins to run at the time the Court issues its opinion recognizing the new rule or at the time that this Court or a court of appeals makes the new rule retroactive, when those dates differ.

Amici agree with petitioner Dodd that the statute can sensibly be read only to include retroactive application as a further condition or prerequisite to the filing of a habeas petition. Thus, the one-year period begins when this Court or the court of appeals holds that the new rule applies retroactively. Amici would add two important points to the AEDPA discussion. First, a reading of the statute that provides that the period of limitations begins to run when this Court issues the opinion recognizing the new rule would work a great unfairness due to the complexity of the retroactivity analysis. Second, such a rule necessitates the filing of

innumerable petitions that may not, in fact, be viable because the new rule is subsequently deemed not to be retroactive.

BACKGROUND

Michael Donald Dodd (Dodd) was convicted of, *inter alia*, engaging in a continuing criminal enterprise ("CCE") in violation of 21 U.S.C. § 841 and 846. Dodd's conviction became final on August 6, 1997. On June 1, 1999, this Court held in *Richardson* v. *United States*, 526 U.S. 813, 815 (1999), that "a jury has to agree unanimously about which specific violations make up the 'continuing series of violations'" of a CCE charge. On April 4, 2001, Dodd filed a *pro se* motion under 28 U.S.C. § 2255 arguing that he was entitled to relief under *Richardson*. On April 19, 2002, the Eleventh Circuit held that *Richardson* recognized a new right that applies retroactively to cases on collateral review. *Ross* v. *United States*, 289 F.3d 677 (11th Cir. 2002) (per curiam), *cert. denied*, 537 U.S. 1113 (2003).

Dodd argued that his claim was timely under the AEDPA because the AEDPA's one-year statute of limitations period for his claim began to run on April 19, 2002, when the Eleventh Circuit made *Richardson* retroactively applicable to cases on collateral review. The court of appeals rejected Dodd's argument and held instead that "the one-year window of opportunity in which Dodd could have timely filed a habeas petition asserting the right recognized in *Richardson* opened on June 1, 1999, when that case was decided, and closed one year later." *Dodd* v. *United States*, 365 F.3d 1273, 1281 (11th Cir. 2004), *cert. granted*, 125 S. Ct. 607 (2004).

SUMMARY OF ARGUMENT

The Eleventh Circuit's interpretation of the AEDPA's statute of limitations provision, 28 U.S.C. § 2255 para. 6(3), is untenable in light of this Court's prior precedent and basic

canons of statutory construction. In *Tyler* v. *Cain*, 533 U.S. 656 (2001), this Court interpreted another provision of the AEDPA, the successive habeas provision for state prisoners in 28 U.S.C. § 2244(b)(2)(A). In that case, the Court held that the phrase "made retroactive" in the successive habeas provision, means "held" to be retroactive. The statute in question here contains nearly identical language, to wit "made retroactively applicable." 28 U.S.C. § 2255 para. 6(3). In light of the Court's interpretation in *Tyler*, the Eleventh Circuit's interpretation of the phrase "made retroactively applicable," which can not be meaningfully distinguished from the phrase "made retroactive," can not be sustained. Moreover, according to the Eleventh Circuit's interpretation, the phrase, "if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review," is mere surplusage.

Additionally, the Eleventh Circuit's rule can not be upheld because it will force some petitioners to bring their claim based on the new rule twice, both as an initial habeas petition and as a successive habeas petition. The Eleventh Circuit's rule forces petitioners to hastily file petitions within one year of the Supreme Court's announcement of a new rule, even if no court has ruled on retroactivity. It thus creates the risk that many petitioners will be harmed by an incorrect determination of non-retroactivity. If this Court or the court of appeals determines that the new rule applies retroactively, petitioners who have already filed and been denied relief will essentially be forced to file a successive petition in order to obtain relief. That relief, however, is much harder to obtain under the successive petition standard. The successive habeas petition standard, unlike the initial petition standard, requires that the new rule be one of constitutional law and that the Supreme Court has held that the new rule applies retroactively. These condititions may not be satisfied in many cases.

Further, the Eleventh Circuit's rule can not be sustained for policy reasons. The Eleventh Circuit's rule is both unfair and inefficient because it places the burden of arguing retroactivity on *every* petitioner seeking application of a new rule, most of whom are proceeding *pro se*. It requires petitioners to file within one year of the Supreme Court's decision or lose their right to do so. The Eleventh Circuit's rule, in turn, requires the state and federal courts to waste its resources adjudicating potentially thousands of petitions based on rules that do not apply retroactively. If a petitioner bases his claim for relief on a new rule announced by this Court, he only has a right to relief if that new rule has been "made retroactively applicable to cases on collateral review." 28 U.S.C. § 2255 para. 6(3). As retroactivity is a complex doctrine, however, it is patently unfair to require petitioners to argue both that the new rule entitles them to relief and that the new rule applies retroactively, without guidance from the courts. Dodd's rule would result in a much more orderly process of determining retroactivity because prisoners would be entitled to wait until the new rule has been held to apply retroactively before filing based on the new rule.

ARGUMENT

I. THE ELEVENTH CIRCUIT'S RULE IS UNTENABLE, UNFAIR, AND WASTEFUL BECAUSE IT REQUIRES HABEAS PETITIONS TO BE FILED BEFORE THE CRITICAL RETROACTIVITY DECISION HAS BEEN MADE

A. *Tyler* v. *Cain* Is Controlling Authority Governing The Interpretation Of 28 U.S.C. § 2255 Paragraph 6(3)

The interpretation of the AEDPA's statute of limitations provision for new rules is controlled by this Court's decision in *Tyler* v. *Cain*, 533 U.S. 656 (2001). In *Tyler*, this Court

interpreted the AEDPA's successive habeas provision for state prisoners, 28 U.S.C. § 2244(b)(2)(A). This is a gatekeeper provision for successive claims that rely on a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." *Id.* The Court held that, under the plain meaning rule, the term "'made retroactive'" means "'held'" to be retroactive. *Tyler*, 533 U.S. at 662. Thus, the Court found that a successive petition based on a new constitutional rule would only be permissible if the Supreme Court "has *held* that the new rule is retroactively applicable to cases on collateral review." *Id.* (emphasis added).

Three years later, in *Dodd* v. *United States*, 365 F.3d 1273 (11th Cir. 2004), the Eleventh Circuit interpreted a similar AEDPA gatekeeping provision: the statute of limitations for federal prisoners seeking to file a petition based on a new rule, specified in 28 U.S.C. § 2255 para. 6(3). Section 2255 para. (6)(3) provides a one-year period of limitation that runs from "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and *made retroactively applicable* to cases on collateral review." 28 U.S.C. § 2255 para. 6(3) (emphasis added). Dodd argued that the one year statute of limitations began to run when the court of appeals held that the new rule applied retroactively. The court of appeals rejected Dodd's argument and held that the one-year statute of limitations in 28 U.S.C. § 2255 para. 6(3) begins to run when the Supreme Court announces a new rule, not when retroactivity is decided. *Dodd*, 365 F.3d at 1281.

Ignoring *Tyler* and the plain language of the statute, the Eleventh Circuit declared that "Congress was simply reiterating the obvious: that § 2255(3) provides a narrow exception which can be relied upon only when the new right recognized by the Supreme court *can be retroactively applied* on collateral review." *Dodd*, 365 F.3d at 1279 (emphasis added). The decision in *Tyler*, however, forecloses such an

interpretation. No sensible distinction exists between the phrase "made retroactive" and the phrase "made retroactively applicable." Because this court has a "duty to construe statutes, not isolated provisions," the Eleventh Circuit's assertion that the phrase "made retroactively applicable" means that the new right might someday be applied retroactively can not be sustained. *Gufstafson* v. *Alloyd Co.*, 513 U.S. 561, 568 (1995) (citing *Philbrook* v. *Glodgett*, 421 U.S. 707, 713 (1975)).

Furthermore, the AEDPA "is to be interpreted as a symmetrical and coherent regulatory scheme, one in which the operative words have a consistent meaning throughout." *Id.* at 569 (holding that the term "prospectus" must have the same meaning under §§ 10 and 12 of the Securities Act of 1933). Thus, this Court's interpretation of "made retroactive" must apply not only to § 2244, but to § 2255 as well. Congress could not have intended for "made" to be interpreted one way in § 2244 and another way in § 2255. Surely, Congress is aware of the fact that it used "made" in other parts of AEDPA. If Congress had disapproved of the Court's interpretation of "made" in § 2244, it could have amended the statute in the three years that have passed since this Court's decision in *Tyler*. Additionally, if Congress meant for "made" to mean something different in § 2255, it could have amended that section. Instead, Congress has left the language unchanged since the Court's decision in *Tyler*.

The Eleventh Circuit's decision in *Dodd* fails to even cite *Tyler*, let alone offer a justification as to why *Tyler* is not controlling. Certainly a reasonable habeas petitioner is entitled to rely on this Court's interpretation of nearly identical language in deciding when to file his petition. This Court has held that its opinions are not automatically rendered retroactive just because the Court has announced principles of retroactivity. *See Tyler*, 533 U.S. at 663. Therefore, under the Court's jurisprudence, the absence of a specific retroactivity holding means that no basis for a petition exists.

Thus, the only conclusion that can be drawn is that the statute of limitations does not begin to run until there is a holding providing for the retroactivity of the new rule.

To hold otherwise would mean that the phrase "if that right has been newly recognized by the Supreme Court *and* made retroactively applicable to cases on collateral review" has no meaning and is mere surplusage. 28 U.S.C. § 2255 para. 6(3) (emphasis added); see *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001) (explaining the Court's reluctance to "'treat statutory terms as surplusage'" particularly where the "term occupies so pivotal a place in the statutory scheme"); *Babbit* v. *Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 697-98 (1995) (utilizing the rule against surplusage in interpreting the Endangered Species Act). The qualifying phrase, "made retroactively applicable" is just that, a further condition in a conjunctive sentence that a petitioner must also satisfy in order to present a procedurally valid petition. The logical structure of the statute, therefore, is that a habeas petitions is procedurally valid only if both (1) the Court has newly recognized the right and (2) that right has been held to be retroactively applicable.[2]

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[2] The Eleventh Circuit's interpretation only makes sense in the limited circumstance where both conditions are satisfied by one opinion of the Court, that is, the Supreme Court announces a new rule and makes that rule retroactively applicable at the same time. Such events do occur in rare habeas cases. *See, e.g.*, *Penry* v. *Lynaugh*, 492 U.S. 302, 329 (1989) (explaining that if the Court were to hold that the Eighth Amendment prohibits the execution of mentally retarded persons, that would be a "new rule" that would apply retroactively to cases on collateral review) (O'Connor, J.), *overruled on other grounds by Atkins* v. *Virginia*, 536 U.S. 304 (2002). If the new rule was announced in a case on direct review, however, any discussion of retroactivity would be purely advisory. *Teague* v. *Lane*, 489 U.S. 288, 316 (1989). In such instances, a determination of retroactivity is left for another day.

B. The Eleventh Circuit's Rule Will Negatively Impact A Petitioner's Ability To File A Successive Petition

The implications of the Eleventh Circuit's rule are far reaching. Most devastating is the impact that the Eleventh Circuit's rule will have on federal prisoners' successive habeas petitions. AEDPA permits a second or successive motion only if it involves "a new rule of *constitutional law*, made retroactive to cases on collateral review *by the Supreme Court*, that was previously unavailable." 28 U.S.C. § 2255 para. 8(2) (emphasis added). Thus, where the new rule is statutory as opposed to constitutional or has been made retroactive by the court of appeals as opposed to the Supreme Court, relief is unavailable under the successive petition provision. The Eleventh Circuit's rule requires a petitioner to file as soon as this Court announces a new rule, without regard to whether that rule has been made retroactive. If the district court finds that the new rule does not apply retroactively, it will dismiss the petition on the merits. Therefore, a later ruling by the court of appeals holding that the rule does in fact apply retroactively could potentially leave some petitioners without a remedy for what is clearly a meritorious claim

Courts of appeal have struggled with the unfairness that results from their inability to grant habeas relief on successive petitions where the Supreme Court has overruled the circuit court's interpretation of a statute. In an attempt to address this situation, they have looked to the savings clause, which provides relief under § 2241 where the petitioner can demonstrate that the remedy provided for under § 2255 is "inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255 note. A number of circuits have formulated tests for the savings clause. See *Reyes-Requena* v. *United States*, 243 F.3d 893, 902-03 (5th Cir. 2001) (collecting cases). As noted by the Fifth Circuit in *Reyes-Requena*, the majority of the tests require a claim of actual innocence and a

showing that the right has been made retroactive. *Id.* at 903. The Eleventh Circuit has created its own even more stringent three-part test that provides that the savings clause applies when: (1) a claim is based upon a retroactively applicable Supreme Court decision; (2) the holding of the Supreme Court decision establishes that the petitioner was convicted for an offense that is now nonexistent; and (3) circuit law foreclosed such a claim at the time it otherwise should have been raised in the trial, appeal, or first § 2255 motion. *Wofford* v. *Scott*, 177 F.3d 1236, 1244 (11th Cir. 1999).

The Eleventh Circuit applied its savings clause test to *Richardson* claim in *Sawyer* v. *Holder*, 326 F.3d 1363 (11th Cir. 2003), *cert. denied*, 540 U.S. 900 (2003). The Eleventh Circuit held that although *Richardson* changed the elements of a CCE offense, it "did not invalidate CCE offenses" such that Sawyer was "convicted of a nonexistent offense." *Id.* at 1365-66. Accordingly, the Eleventh Circuit held that Sawyer "could not demonstrate that § 2255 was inadequate or ineffective to test the legality of his conviction." *Id.* at 1367.

The combination of the Eleventh Circuit's statute of limitations rule articulated in *Dodd* and its savings clause rule articulated in *Wofford* can only be described as a legal "Catch-22." If this Court interprets a federal criminal statute, but does not decide if its interpretation applies retroactively; the Eleventh Circuit's rule would require that a habeas petitioner file within one year of that ruling, even if *no* retroactivity decision has been made. For example, if petitioner A files his initial habeas petition on the basis of a newly recognized statutory right prior to a retroactivity determination and the court decides that the petition should be denied because the new rule should not apply retroactively, the petition is denied on the merits.[3] If, in petitioner B's later

[3] Because the first adjudication of the petition is deemed to be on the merits, it would not fall under one of the situations where this Court has explained that a later petition is not "second or successive." Those situations include: (1) where the later petition raises the same grounds as a previous petition that had been dismissed as premature, *Stewart* v. *Martinez-Villareal*, 523 U.S. 637, 643-46 (1998); and (2) where a state prisoner's later petition raises the same grounds as a previous petition that had been dismissed for failure to exhaust state remedies, *Slack* v. *McDaniel*, 529 U.S. 473, 487 (2000).

case, the court of appeals decides that the new rule should apply retroactively to cases on collateral review, petitioner A is precluded from seeking relief on what is clearly a meritorious claim simply because he filed too soon. This is because the claim would not satisfy the more stringent successive habeas petition standard in that it (1) would rely on a new statutory rule, not a new rule of *constitutional law*, AND (2) the new rule would not have been made retroactive *by the Supreme Court*. Even if this Court granted cert in a case applying its decision retroactively and, thus, cured the second problem by holding that the new rule applied retroactively, the first problem would remain.

The Eleventh Circuit's savings clause test would then come into play, but would not save petitioner A from the harm that was caused by him filing too soon because the claim would not be allowed. As illustrated above, under the Eleventh Circuit's rules, where the new rule of law is based on this Court's interpretation of a federal criminal statute (as opposed to the invalidation of the statute in its entirety), relief would be unavailable by either successive petition or § 2241. This conundrum can be prevented simply by allowing petitioners to wait to file their habeas petitions until after the retroactivity decision has been made.

Dislodging this bar created by the Eleventh Circuit only ensures a fair opportunity to seek relief, it neither guarantees relief nor creates undue delay. Petitioners would still have to get over the hurdle of procedural default before their claims could proceed. See *Bousley* v. *United States*, 523 U.S. 614, 622 (1998) (explaining that a first § 2255 motion must meet

the cause and prejudice standard if it presents a claim not made earlier).[4] Thus, the Eleventh Circuit's rule in *Dodd* is nothing more than an unnecessary hurdle in what is already a difficult road to relief.

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[4] This Court has held "that a claim that 'is so novel that its legal basis is not reasonably available to counsel' may constitute cause for a procedural default." *Bousley*, 523 U.S. at 622 (quoting *Reed* v. *Ross*, 468 U.S. 1, 16 (1984)). The finding of a "new rule" for purposes of the retroactivity analysis, however, does not also mean that the petitioner has shown cause to justify his failure to raise his claim on direct appeal. The two standards simply do not overlap. For purposes of the *Teague* analysis, a rule is new so long as the precedent existing at the time of the defendant's conviction did not dictate the rule. This is a less rigorous requirement than that for showing cause in order to justify procedural default. In *Bousley*, this Court elaborated on what constitutes a novel claim. In that case, Bousley claimed on collateral review that his guilty plea for "using" a firearm in violation of 18 U.S.C. § 924(c)(1) was not knowing and intelligent because the district court misinformed him of the nature of the charged crime. Bousley's claim was based on the fact that, five years after his conviction, the Supreme Court held in *Bailey* v. *United States*, 516 U.S. 137, 144 (1995), that § 924(c)(1)'s "'use'" prong requires the Government to show "'active employment of the firearm,'" rather than mere possession. *Bousley*, 523 U.S. at 616. Although the Court recognized that its holding in *Bailey* changed the relevant legal landscape, it held that Bousley's claim was not novel. The Court reached this conclusion because other defendants had previously challenged their § 924(c)(1) convictions on grounds that "use" required more than the mere possession of a firearm. *See id.* at 622-23. The Court further rejected Bousley's argument that his failure to raise the claim on direct review "should be excused because, before *Bailey*, any attempt to attack [his] guilty plea would have been futile." *Id.* at 623 (internal quotation marks omitted, alteration in original). Instead, the Court stated that "futility cannot constitute cause if it means simply that a claim was unacceptable to that particular court at that particular time." *Id.* (internal quotation marks omitted) (citing *Engle* v. *Isaac*, 456 U.S. 107, 130 n. 35 (1982)).

C. The Eleventh Circuit's Rule is Unfair Because It Requires Petitioners To Predict The Outcome Of The Court's Retroactivity Analysis

The "Great Writ" Habeas Corpus, is based on the principle that "in a civilized society, government must always be accountable to the judiciary for a man's imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release." *Fay* v. *Noia*, 372 U.S. 391, 402 (1963), *overruled in part by Wainwright* v. *Sykes*, 433 U.S. 72 (1977). When the law changes, the problem of retroactivity arises; a court must determine if the new rule of law should be applied to events arising before it was announced. This Court has explained that a decision is not made retroactive simply because the Court has established principles of retroactivity. *Tyler*, 533 U.S. at 663. The Eleventh Circuit's rule, however, places the burden on prisoners to predict whether the change in law will apply retroactively. For obvious reasons, however, retroactivity is a complicated area of the law.[5]

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[5] This Court's retroactivity doctrine has a long and complicated history which began in *Linkletter* v. *Walker*, 381 U.S. 618 (1965), *overruled by Griffith* v. *Kentucky*, 479 U.S. 314 (1987), where the Court faced the issue of whether the new constitutional rule announced in *Mapp* v. *Ohio*, 367 U.S. 643 (1961), providing that illegally obtained evidence is inadmissible in criminal trials, should apply retroactively to habeas corpus proceedings. *Linkletter*, 381 U.S. at 644. The Court determined that the United States Constitution neither prohibits nor requires the retroactive effect of new rules. *Id.* at 629. In addition, the Court held that a reviewing court must weigh the merits and demerits in each case to determine if a new rule should apply retroactively. *Id.* The Court promulgated a three-pronged balancing test for reviewing courts to follow to determine if new rules should apply retroactively on collateral review. The reviewing court should consider the prior history of the new law, the purpose and effect of the law, and whether retrospective operation of the rule would further or retard its operation. *Id.* *Linkletter* remained the standard for retroactivity on collateral review for over twenty years. The Court's current retroactivity doctrine, however, was deeply influenced by Justice Harlan's

Further, a full 93% of habeas petitioners proceed *pro se*. See *Duncan*, 533 U.S. at 186 (Breyer J., dissenting) (citing statistics). Consequently, unrepresented habeas petitioners must not only argue that the new rule entitles them to relief, but must also argue that the new rule applies retroactively. The Eleventh Circuit's rule unnecessarily endangers the integrity of the "Great Writ" because it ensures that there will be a greater number of petitioners whose petitions will be denied based upon inartfully drafted retroactivity arguments, rather than the merits of their claims.

Any attempt to argue that a new rule applies retroactively would likely begin with an examination of *Teague* v. *Lane*, 489 U.S. 288 (1989), where the Court articulated the modern version of the retroactivity doctrine. In *Teague*, the Court faced the issue of whether the new constitutional rule announced in *Taylor* v. *Louisiana*, 419 U.S. 522 (1975) -- that under the Sixth Amendment the jury venire must be drawn from a fair cross section of the community -- applied retroactively to cases on collateral review. The Court held that a state prisoner seeking collateral relief under the federal habeas statute could not base his claim upon a "new" rule of constitutional criminal procedure established after the date on

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dissenting opinions in *Desist* v. *United States*, 394 U.S. 244 (1969), *overruled by Griffith* v. *Kentucky*, 479 U.S. 314 (1987), and *Mackey* v. *United States*, 401 U.S. 667 (1971). Justice Harlan argued that new constitutional rules should not apply retroactively to cases on collateral review except in two limited circumstances. *Id.* at 676 (Harlan, J., concurring in part and dissenting in part). The first exception allowed new substantive due process rules that place "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe" to be applied retroactively. *Id.* at 692. The second exception was for the nonobservance of procedures that are "'implicit in the concept of ordered liberty.'" *Id.* at 693. The Court re-examined the *Linkletter* standard in *Teague* v. *Lane*, 489 U.S. 288 (1989), where it explained that the *Linkletter* standard had led "to unfortunate disparity in the treatment of similarly situated defendants on collateral review." *Id.* at 305 (O'Connor, J.).

which his state conviction became final. *Teague*, 489 U.S. at 310.

The Court defined a "new rule" as any rule not "*dictated* by precedent existing at the time the defendant's conviction became final." *Id.* at 301 (O'Connor, J.). The Court articulated two instances where new rules will apply retroactively on collateral review. *Id.* at 305. First, a new rule should apply retroactively if it "places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'" *Id.* at 311 (quoting *Mackey*, 401 U.S. at 692 (Harlan, J., concurring in part and dissenting in part)). Second, a new rule should be applied retroactively if the rule requires observance of "'those procedures that . . . are "implicit in the concept of ordered liberty."'" *Id.* (ellipsis in original) (quoting *Mackey*, 401 U.S. at 693 (Harlan, J., concurring in part and dissenting in part)). The Court noted that the second exception should be limited to watershed rules of criminal procedure. *Id.* Although § 2255 was not directly addressed in the opinion, the Courts of Appeal have uniformly held that the *Teague* retroactivity doctrine applies to both § 2254 and § 2255 habeas petitions. *United States* v. *Swindall*, 107 F.3d 831 (11th Cir. 1997) (per curiam) (collecting cases).

The retroactivity analysis is further complicated by the AEDPA, which was enacted in 1996 and completely revised collateral relief for state and federal prisoners under §§ 2254 and 2255. The AEDPA did not remove the *Teague* bar to retroactivity. *Horn* v. *Banks*, 536 U.S. 266 (2002) (per curiam) ("The AEDPA and *Teague* inquiries are distinct. . . . [I]n addition to performing any analysis required by AEDPA, a federal court considering a habeas petition must conduct a threshold *Teague* analysis when the issue is properly raised by the state."). Instead, under the revised § 2255, relief remains unavailable for a defendant relying upon a ruling handed down after his conviction became final, unless the ruling falls within one of the narrow exceptions defined by

Teague and its progeny. An applicant under § 2255, however, is not barred from raising claims based on new rulings that interpret the reach of a substantive offense rather than regulate procedure. If a defendant is convicted for conduct that this Court later declares does not constitute a federal offense, *Teague* will not bar his motion for relief under § 2255. *Bousley* v. *United States*, 523 U.S. 614 (1998). *Teague* only comes into play where the new rule is procedural rather than substantive. Thus, the distinction between substantive and procedural rules is critical in the retroactivity determination.

The distinction between substantive and procedural rules is often difficult, however, and some cases do "not fall neatly under either the substantive or procedural doctrinal category." *United States* v. *Woods*, 986 F.2d 669, 677 (3d Cir. 1993). For *Teague* purposes, substantive judgments are not simply those that decriminalize certain conduct but include those that alter the meaning and scope of a statute. *Bousley*, 523 U.S. at 620. Procedural rules are those that implicate how the trial process functions. *Id.* The Court has stated that new substantive rules – including both "decisions that narrow the scope of a criminal statute by interpreting its terms" and "constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish" – "'necessarily carry a significant risk that a defendant stands convicted of "an act that the law does not make criminal'" or faces a punishment that the law cannot impose upon him." *Schriro* v. *Summerlin*, 124 S. Ct. 2519, 2522-23 (2004) (quoting *Bousley*, 523 U.S. at 620). The Court has explained that procedural rules "generally do not apply retroactively" because "[t]hey do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." *Id.* at 2523. The Court characterized this as a "more speculative connection to innocence." *Id.*

This case directly involves this Court's interpretation of a federal statute, 21 U.S.C. § 848, in *Richardson*. The Courts of Appeal have uniformly held that *Richardson* is a new rule that applies retroactively to cases on collateral review because "the Court changed the elements of a CCE offense and, thus, changed the meaning of that statute." *Ross*, 289 F.3d at 681; see also *Santana-Madera* v. *United States*, 260 F.3d 133, 139 (2d Cir. 2001); *United States* v. *Lopez*, 248 F.3d 427, 432 (5th Cir. 2001); *Lanier* v. *United States*, 220 F.3d 833, 838 (7th Cir. 2000); *Murr* v. *United States*, 200 F.3d 895, 906 (6th Cir. 2000). Thus, the rule announced in *Richardson* was substantive. While this case involves the interpretation of a federal criminal statute that is not subject to the rules of *Teague*, the Eleventh's Circuit rule would also reach new rules that fall under *Teague*.

The application of *Teague* has been less than predictable. This Court has broadly defined "new rule" to include not only a rule that "'breaks new ground'" or overrules an earlier holding, but also decisions that extend the reasoning of prior cases. *Saffle* v. *Parks*, 494 U.S. 484, 488 (1990). Further, the Court has found that a rule is not dictated by precedent if there exists a conflict of authority or if reasonable judges could disagree as to the proper rule. *Butler* v. *McKellar*, 494 U.S. 407, 415 (1990). Even a member of this Court has recognized that "[d]istinguishing new rules from those that are not new under our post-*Teague* jurisprudence is not an easy task." *O'Dell* v. *Netherland*, 521 U.S. 151, 173 (1997) (Stevens, J., dissenting). If it is a difficult task for judges, then it is a next to impossible task for prisoners proceeding *pro se*.

As this Court and the courts of appeal tend to categorize many rules as new, petitioners would have to argue that the new rule is retroactive under one of the two *Teague* exceptions. Once a rule is categorized as new, however, petitioners face an uphill battle. This Court has rarely invoked the *Teague* exceptions to hold a new rule

retroactively applicable. Because retroactivity is considered as a threshold matter in habeas cases, the Court determined in *Penry* v. *Lynaugh*, 492 U.S. 302, 330 (1990), *overruled on other grounds by Atkins* v. *Virginia*, 536 U.S. 304 (2002), that a "new rule" barring the execution of mentally retarded persons would fit within *Teague's* first exception. The Court nevertheless went on to hold, however, that the Eighth Amendment did not prohibit the execution of mentally retarded persons. *Penry*, 492 U.S. at 335. Thus, the Court's finding that such a rule would fit into *Teague's* first exception was purely theoretical. In refusing to apply the first *Teague* exception to other new rules, the Court has often said that the new procedural rule "would neither decriminalize a class of conduct nor prohibit the imposition of capital punishment on a particular class of persons." *Saffle*, 494 U.S. at 495.

Unlike the first exception, this Court has yet to hold that a new rule qualifies under the second *Teague* exception.[6]

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[6] *O'Dell*, 521 U.S. at 161 (holding that the rule entitling a death-eligible defendant to a jury instruction telling the jury that he is ineligible for parole would be a "new rule" that does not meet *Teague's* second exception); *Gray* v. *Netherland*, 518 U.S. 152, 170 (1996) (holding that the rule requiring the state to give notice to a defendant of the evidence it plans to present at a sentencing hearing would be a "new rule" that does not satisfy *Teague's* second exception); *Lambrix* v. *Singletary*, 520 U.S. 518, 539 (1997) (holding that the rule governing relief available when judge and jury weigh invalid aggravating factors when handing down a death sentence would be "new," but not a "watershed," rule); *Goeke* v. *Branch*, 514 U.S. 115, 120 (1995) (per curiam) (holding that the rule granting substantive due process protection against the required dismissal of a fugitive's appeal would be a "new" rule that is not "'so central'" as to fit within *Teague's* second exception); *Caspari* v. *Bohlen*, 510 U.S. 383, 396 (1994) (holding that the double jeopardy rule preventing a state from twice subjecting a defendant to a noncapital sentencing hearing would be a "new," but not a "watershed," rule); *Gilmore* v. *Taylor*, 508 U.S. 333, 345 (1993) (holding that the rule requiring an express jury instruction that precluded the jury from returning a murder conviction if it concluded that the defendant possessed a mitigating mental state would be "new," but not a "watershed," rule); *Graham* v. *Collins*, 506 U.S. 461, 478 (1993)

Although no rule has qualified under *Teague's* second exception, the Court has stated that the rule announced in *Gideon* v. *Wainwright*, 372 U.S. 335, 348 (1963), holding that defendants in all felony criminal prosecutions have the right to counsel, is an example of the type of rule that would be covered by *Teague's* second exception. *Saffle*, 494 U.S. at 495. In *Teague*, however, the Court specifically noted that it is unlikely that a rule encompassing the basic components of due process, such as the *Gideon* rule, has yet to emerge. *Teague*, 489 U.S. at 313. The cases where the Court refused to apply *Teague's* second exception, however, contained vigorous dissenting opinions.[7] Several lower courts have applied *Teague's* exception, but only a few have found a rule to satisfy the exception.[8]

(holding that the Fourteenth Amendment due process right not to have a sentencing jury follow the state's three-question procedure would be a "new rule" that is not a "watershed rule"); *Sawyer v. Smith*, 497 U.S. 227, 241-43 (1990) (holding that the Eighth Amendment rule prohibiting the imposition of a death sentence by a sentencer with a false sense of responsibility would be a "new rule," but not a "watershed" rule); *Butler*, 494 U.S. at 416 (holding that the rule that the Fifth Amendment bars police-initiated interrogation following a suspect's request for counsel in a separate investigation is a "new rule," but not a "watershed" rule); *Saffle*, 494 U.S. at 495 (holding that the Eighth Amendment right to allow a jury to base its sentencing decision on sympathy is not a "watershed rule").

[7] *See, e.g., O'Dell*, 521 U.S. at 171 (Stevens, J., dissenting) (stating that the *Simmons* rule "is surely a bedrock procedural element of a full and fair hearing"); *Saffle*, 494 U.S. at 507 (Brennan, J., dissenting) (stating that a rule that allows the jury to base its sentencing decision in a capital case upon sympathy for the defendant "must apply retroactively under the second *Teague* exception."); *Sawyer*, 497 U.S. at 254 (Marshall, J., dissenting) (stating that the *Caldwell* rule fits into *Teague's* second exception because "it is a rule 'without which the likelihood of an accurate [verdict] is seriously diminished'") (quoting *Teague*, 489 U.S. at 313).

[8] *Humphrey* v. *Cain*, 120 F.3d 526, 529 (5th Cir. 1997) (recognizing that the rule in *Cage* v. *Louisiana*, 498 U.S. 39 (1990), *overruled by Estelle* v. *McGuire*, 502 U.S. 62 (1991), satisfies the second exception to *Teague*, yet holding that prior Fifth Circuit precedent prevents a

The disagreement within the Court, as well as the inconsistent application of *Teague* in the lower courts, demonstrates the difficulty of the analysis required by *Teague*. To successfully argue that a rule should be applied retroactively, a petitioner must convince the court that the rule falls outside of *Teague* because it is substantive. The petitioner must also argue, in the alternative, that if the new rule is procedural then it is covered by one of the *Teague* exceptions. In addition to making these sophisticated legal

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satisfaction of *Teague's* second exception in habeas cases and requesting en banc consideration), *rev'd on reh'g*, 138 F.3d 552 (5th Cir. 1998) (en banc); *Adams* v. *Aiken*, 41 F.3d 175, 178-79 (4th Cir. 1994) (finding the *Cage* rule to satisfy *Teague's* second exception); *Nutter* v. *White*, 39 F.3d 1154, 1156 (11th Cir. 1994) (holding that the rule in *Cage*, satisfied *Teague's* second exception; the *Cage* case involved a jury instruction that defined reasonable doubt as "'substantial doubt'" and "'grave uncertainty,'" and therefore violated due process); *Williams* v. *Dixon*, 961 F.2d 448, 456 (4th Cir. 1992) (holding that a jury instruction requiring the jury to unanimously find mitigating evidence constituted a new rule of criminal procedure that qualified under *Teague's* second exception); *Graham* v. *Hoke*, 946 F.2d 982, 993 (2d Cir. 1991) (holding that the rule in *Cruz* v. *New York*, 481 U.S. 186 (1987), which prevents an "admission of a nontestifying codefendant's confession even if that confession interlocks with that of the defendant" falls under the second exception to *Teague*); *Ostrosky* v. *Alaska*, 913 F.2d 590, 594 (9th Cir. 1990) (holding that a defendant's right to rely on a lower court's finding of a statute's unconstitutionality in that defendant's case constitutes a new rule that qualifies under *Teague's* second exception); *Hall* v. *Kelso*, 892 F.2d 1541, 1543 n.1 (11th Cir. 1990) (stating that "a burden-shifting error would be subject to retroactive correction on habeas review because not only is it a 'bedrock, "axiomatic and elementary" [constitutional] principle,' but it is also an error that diminishes the 'likelihood of an accurate conviction"') (citations omitted, alteration in original); *Safian* v. *Scully*, No. 90 Civ. 7489, 1991 WL 143403, at *2 (S.D.N.Y. 1991) (holding that the *Cruz* rule satisfies *Teague's* second exception), *aff'd*, 962 F.2d 4 (2d Cir. 1992) (table); *see also Hopkinson* v. *Shillinger*, 888 F.2d 1286, 1292 (10th Cir. 1989) (en banc) (holding that the rule in *Caldwell* v. *Mississippi*, 472 U.S. 320 (1985), satisfies the second *Teague* exception). This Court later effectively overruled *Hopkinson* in *Sawyer* v. *Smith*, 497 U.S. 227, 234 (1990).

arguments, the petitioner would also have to argue that the rule applies to his case and entitles him to relief. Given that nearly all habeas petitioners proceed *pro se*, this is a tall and messy order.

As a petitioner's right to relief may turn on whether a new rule has been "made retroactively applicable," it is simply unfair to require petitioners to make these complicated retroactivity arguments without the guidance of the courts. But that is exactly what the Eleventh Circuit's rule would require. Admittedly, under the rule advocated herein, some habeas petitioners would be required to file in the absence of retroactivity precedents, but *all* petitioners need not file. The petitioners that do file are likely to be represented individuals with stronger cases (given the strategic importance of the issue to the habeas bar) rather than a great mass of individuals with inarticulate and sweeping claims. Thus, the wiser course is to allow prisoners to wait until a retroactivity decision has been made before filing a petition.

D. The Eleventh Circuit's Rule Needlessly Wastes Judicial Resources

The Eleventh Circuit's rule would unleash a torrent of potentially unnecessary habeas petitions on the courts. As the prior section demonstrates, it is rare for courts to hold new rules retroactively applicable to cases on collateral review. A *pro se* petitioner seeking his release, however, is unlikely to examine the Supreme Court precedent on retroactivity, recognize that he has at best a modest chance of convincing a court to apply the rule retroactively, and, thus decide not to file a petition. Instead, a *pro se* petitioner is motivated to file any motion that has even an outside chance of securing his release. The Eleventh Circuit's rule encourages this behavior. Thus, the Eleventh Circuit's rule would both drain the resources of the federal judiciary and upset society's interest in the finality of criminal convictions.

This Court has repeatedly expressed its concern about the impact of retroactivity on limited judicial resources. The Court has often directed its concern toward "'the costs imposed upon the States[s] by retroactive application of new rules of constitutional law on habeas corpus.'" *Teague*, 489 U.S. at 310 (O'Connor, J.) (alteration in original) (quoting *Solem* v. *Stumes*, 465 U.S. 638, 654 (1984) (Powell, J., concurring in judgment)). It is equally true, however, that the application of new rules on collateral review continually forces the federal judiciary "to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards." *Id.*

But the rule advocated by the Eleventh Circuit would hardly conserve judicial resources. Indeed, prisoners would be certain to file any and all petitions with regard to rights that could imaginably be the subject of a retroactivity ruling. The Eleventh Circuit observed that, under its interpretation of § 2255 para. 6(3), "a petitioner *may file* a § 2255(3) motion *immediately* after the Supreme Court decision announcing the right upon which a motion is based." *Dodd*, 365 F.3d at 1280 (first emphasis added). It would be more accurate to say that a petitioner *must file* such a motion, within one year of such a decision, or lose his opportunity to do so. And, of course, that motion must be adjudicated, at no little cost in money and time to the federal and state court systems.

In enacting the AEDPA, Congress intended to bring finality to judicial determinations, thus reducing the time and costs to federal courts of habeas litigation. "It is generally accepted that one of the principal functions of AEDPA was to ensure a greater degree of finality for convictions." *Johnson* v. *United States*, 340 F.3d 1219, 1224 (11th Cir. 2003), *cert. granted*, 125 S. Ct. 26 (2004); see *Duncan*, 533 U.S. at 178; *Williams* v. *Taylor*, 529 U.S. 420, 436 (2000); *Jones* v. *United States*, 304 F.3d 1035, 1039 (11th Cir. 2002) (per curiam) ("A fundamental purpose for the AEDPA was to establish finality in post-conviction proceedings."), *cert. denied*, 538 U.S. 947 (2003); *Brackett* v. *United States*, 270 F.3d 60, 69 (1st Cir. 2001) ("[O]ne of the signal purposes animating AEDPA is the desire of Congress to achieve finality in criminal cases, both federal and state.").

The interest is finality, however, is ill-served, by a rule that foists upon both federal and state courts large numbers of hastily prepared habeas petitions.[9] Under the Eleventh Circuit's rule, no case will be filed more than one year after this Court recognizes a new right because no petitioner can afford to wait and see if the new right applies retroactively. The Eleventh Circuit turns finality on it head: though only one case in a hundred may hold a right retroactively applicable, the court's rule would ensure active litigation of the remaining ninety-nine. Because it is likely that the retroactivity question will not yet have been decided, petitioners are required to prepare and file, and the courts are required to rule upon petitions that may never have been viable where the courts find that the newly recognized right is not retroactively applicable. For the reasons discussed *supra* most new rules are held *not* to be retroactively applicable. See Marc M Arkin, *The Prisoner's Dilemma: Life in the Lower Federal Courts after Teague* v. *Lane*, 69 N.C. L. Rev. 371, 390 (1991) (explaining that the retroactive application of a new right is a rare event). Moreover, within the period of limitations allotted by the Eleventh Circuit, petitioners may be unsure whether this Court, in fact, has recognized a new right, let alone whether that right will be made retroactively applicable. See Larry W. Yackle, *Reclaiming the Federal Courts* 196 (1994) ("Constitutional law is a gradually evolving body of thinking about an ever-changing social landscape. It is not . . . a series of lurching leaps from

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[9] On the difficulty of preparing a habeas petition, *see* Peter Sessions, *Swift Justice: Imposing a Statute of Limitations on the Federal Habeas Corpus Petitions of State Prisoners*, 70 S. Cal. L. Rev. 1513, 1555-69 (1997).

unquestionable propositions to 'new rules."). Yet the Eleventh Circuit would ask -- indeed, require -- petitioners to litigate before they can be sure they have a legal claim for redress. Thus, the Eleventh Circuit's rule mandates filing not only when the crucial retroactivity question is unanswered, but also where the scope of the newly recognized right may be far from certain.

The events following this Court's decision in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), illustrates both of the problems created by the Eleventh Circuit's rule. In *Apprendi*, this Court held that the Constitution requires that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. The lower courts initially struggled with whether *Apprendi* applied retroactively, but eventually agreed that *Apprendi* did not apply retroactively.[10] The number of petitions filed post-*Apprendi*, however, was so numerous that the Seventh Circuit warned prisoners who were "peppering district judges with initial collateral attacks based on *Apprendi*" of the problems associated with the successive habeas petition standard. *Talbot* v. *Indiana*, 226 F.3d 866,

[10] All of the courts of appeals have held that because *Apprendi* is a procedural rule that does not fall within the "watershed" exception, it is not retroactively applicable to cases on collateral review. *See, e.g.*, *United States* v. *Swinton*, 333 F.3d 481 (3d Cir. 2003), *cert. denied*, 540 U.S. 977 (2003); *Sepulveda* v. *United States*, 330 F.3d 55 (1st Cir. 2003); *Coleman* v. *United States*, 329 F.3d 77 (2d Cir. 2003), *cert. denied*, 540 U.S. 1061 (2003); *Goode* v. *United States*, 305 F.3d 378 (6th Cir. 2002); *United States* v. *Brown*, 305 F.3d 304 (5th Cir. 2002) (per curiam), *cert. denied*, 538 U.S. 1007 (2003); *Curtis* v. *United States*, 294 F.3d 841 (7th Cir. 2002), *cert. denied*, 537 U.S. 976 (2002); *United States* v. *Mora*, 293 F.3d 1213 (10th Cir. 2002), *cert. denied*, 537 U.S. 961 (2002); *United States* v. *Sanchez-Cervantes*, 282 F.3d 664 (9th Cir. 2002), *cert. denied*, 537 U.s. 939 (2002); *McCoy* v. *United States*, 266 F.3d 1245 (11th Cir. 2001); *United States* v. *Moss*, 252 F.3d 993 (8th Cir. 2001); *United States* v. *Sanders*, 247 F.3d 139 (4th Cir. 2001).

869 (7th Cir. 2000). The Court urged petitioners to reconsider filing initial petitions before a finding of retroactivity has been made by any court because "the itch to invoke the latest decision of the Supreme Court can be costly," as "a loss will require this court's approval to launch a later collateral attack if better grounds for relief become available." *Id.* Thus, the court urged prisoners to "choose their issues wisely." *Id.*

In 2004, this Court decided *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004). The Court explained that its "precedents make clear . . . that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of facts reflected in the jury verdict or admitted by the defendant*." *Id.* at 2537. Despite the similarities between Washington's sentencing scheme and the federal sentencing guidelines, this Court refused to express an opinion on *Apprendi*'s application to the federal sentencing guidelines. *Id.* at 2538. Nonetheless, numerous district courts and several circuit courts of appeal have found that *Blakely* does apply to the sentencing guidelines, thereby generating significant uncertainty in the federal criminal justice system. Justice O'Connor noted in her dissent in *Blakely* that collateral relief may still be available to all defendants who were sentenced after the June 2000 *Apprendi* decision. *Id.* at 2549 (O'Connor, J., dissenting).

This Court recently decided that *Blakely* does apply to the federal sentencing guidelines. *United States* v. *Booker*, No. 04-104, slip op. at 19 (U.S. Jan. 12, 2005); *United States* v. *Fanfan*, No. 04-105, slip op. at 1 (U.S. Jan. 12, 2005). Although the Court stated that its ruling applies to all cases pending on direct review, it did not address the issue of retroactivity because *Booker* and *Fanfan* were not before the Court on collateral review. *Fanfan*, slip op. at 25. Thus, the lower federal courts will be left to decide whether the decisions in *Booker* and *Fanfan* applies retroactively to cases on collateral review.

If the Court adopts the Eleventh Circuit's rule, however, chaos will ensue. Regardless of the ultimate decision on retroactivity, however, the Eleventh Circuit's rule ensures that the courts will be flooded with thousands of petitions by federal prisoners seeking retroactive application of *Booker* and *Fanfan*, as well as state prisoners seeking retroactive application of *Blakely* because the statute of limitations that applies to federal prisoners under § 2255 is identical to the one that applies to federal prisoners in § 2254. 28 U.S.C. § 2244(d)(1)(C). State prisoners, sentenced under schemes similar to that held impermissible in *Blakely*, will rush to file before June of 2005 and federal prisoners will rush to file their claims based on *Booker* by January of 2006, or risk losing their right to file such petitions. This will be the likely result, unless this Court holds that prisoners must wait until a decision on retroactivity has been made before they file their petitions.

By contrast, the rule advocated by Dodd would lead to a much more orderly and structured process of determining retroactivity. The Eleventh Circuit suggested that one of the problems with the rule advocated by Dodd was that "if all petitioners faithfully awaited a retroactivity decision before asserting their rights . . . the Supreme Court and the circuits might never have occasion to make a retroactivity decision and the one-year window for filing a § 2255(3) motion might *never* open." *Dodd*, 365 F.3d at 1280. Petitioners filing under § 2255 para. 6(1), whose conviction became final in the year prior to the announcement of the new rule, however, may file and raise the retroactivity argument without the restrictions imposed by § 2255 para. 6(3). Additionally, it is the fundamental role of *amici* to select from among the potential claimants and determine whose case presents the most compelling circumstances for retroactive application and

to present those arguments to the district courts.[11] Further, members of the *amici* groups may choose to amend a petition pending when this Court announces a new rule.[12] Thus, contrary to the assertion of the Eleventh Circuit, there are at least three different ways that the retroactivity argument could reach the courts under Dodd's rule. If the court of appeals in a particular circuit holds that the new rule does not apply retroactively, prisoners have no reason to file unless and until this Court finds that the new rule does apply retroactively. The courts are thereby saved from handling a great number of meritless petitions and prisoners are saved from the unfairness of premature and prejudicial denials.

Where there is a finding that the new rule applies retroactively, the courts will indeed receive a large number of petitions, but only the scope of the new rule or right will be in question, not its retroactivity, and the courts will be dealing only with those petitions that are procedurally viable in the first instance. To be sure, even under the rule proposed by Dodd and supported by *amici*, some prisoners will file early in any event, but as long as the prisoners are entitled -- and, indeed encouraged -- to wait, the number of such filings would be far less that what would be filed under the Eleventh Circuit's rule.[13] This is especially true where the

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[11] The court is permitted to appoint an attorney in habeas corpus cases. 28 U.S.C. § 2255 para. 7.

[12] The petitioner in *Ross* v. *United States*, 289 F.3d 677, 680 (11th Cir. 2002), had a petition pending when the Supreme Court announced its new rule in *Richardson*. The petitioner then amended his petition and the Eleventh Circuit went on to hold that the rule announced in *Richardson* applied retroactively to cases on collateral review. *Id.*

[13] To further reduce the number of filings, the court could even employ the Seventh Circuit's procedure for successive petitions and dismiss any other early motions without prejudice until the court rules on the retroactivity question. *Hernandez* v. *United States*, 226 F.3d 839 (7th Cir. 2000). In *Hernandez*, the Seventh Circuit faced the question of what should be done with successive petitions that were filed prior to a

consequences of an early unsuccessful filing are widely understood to preclude later relief under the successive petition rule. The Eleventh Circuit's rule, however, vitiates any such incentives for a more orderly process.

The Eleventh Circuit also found that the rule advocated by Dodd would reduce judicial efficiency because "each circuit would effectively have a different statute of limitations, many of which could stretch on for years." *Dodd*, 365 F.3d at 1281 (citing *United States* v. *Lopez*, 248 F.3d 427, 433 (5th Cir. 2001)). The court stated that "[s]o unpredictable and inconsistent a result would" not "be consonant with the intent of a statute which, on its face, plainly aims to establish a single, uniform statute of limitations." *Id.* at 1281. Such formalism, however, neither serves the interests of finality nor conserves the judicial resources that are the primary goals of the AEDPA. While it is true that the statute of limitations may differ in each circuit, the treatment of the prisoners will nonetheless be more uniform than under the Eleventh Circuit's rule. In the one year allowed for filing under the Eleventh Circuit's rule, every district court in the nation will be forced to decide the retroactivity question, a needless and expensive exercise. Further, as is described above, those prisoners whose petitions are wrongfully denied on the retroactivity question (*e.g.* where this Court or the court of appeals decides in favor of retroactivity) would be unjustly and unnecessarily harmed. Dodd's rule, however, would limit the number of early filings and assure that petitioners within a circuit asserting that a new rule applies retroactively

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Supreme Court decision holding a new rule retroactive. *Id.* at 841. The court found that those claims were not ripe until the Supreme Court has ruled on the retroactivity question. *Id.* It then decided to treat those claims in the same manner that they handle petitions relying on unexhausted claims, and dismiss them without prejudice to re-filing at such time as the Court renders a decision in favor of retroactivity. *Id.* The court of appeals in each circuit could employ a similar rule once a single case asking for the new rule to be applied retroactively is ripe for decision.

are more likely to receive the same outcome. Although uniformity across the nation may not be guaranteed, Dodd's rule would more quickly and efficiently identify circuit splits for this Court's resolution with minimal harm to prisoners awaiting the retroactivity decision. Thus, Dodd's rule promotes both uniformity and judicial efficiency, while the Eleventh Circuit's rule promotes neither.

Dodd's rule will also insure that criminal convictions that have become final will not be subject to additional litigation based on a new rule that does not apply retroactively. This Court has explained that "[t]he scope of the *Teague* exceptions must be consistent with the recognition that '[a]pplication of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system.'" *Sawyer* v. *Smith*, 497 U.S. 227, 242 (1990) (quoting *Teague*, 489 U.S. at 309). Because this Court has carefully delineated the limited situations where a new rule applies retroactively, however, the Court's determination that a case applies retroactively necessarily carries with it a determination that the benefit and/or importance of the rule outweighs the interest in finality. The interest in finality remains, however, for those cases not subject to retroactive application of a new rule. The Eleventh Circuit's rule encourages unnecessary challenges to final convictions in this broader group of cases, whereas Dodd's rule does not.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the court of appeals.

Respectfully Submitted,

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